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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 823

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC.,
Petitioners
(Claimant and Respondents-Appellants below),

against

"HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others,
Respondents
(Libellants-Appellees below).

(CONSOLIDATED CAUSES)

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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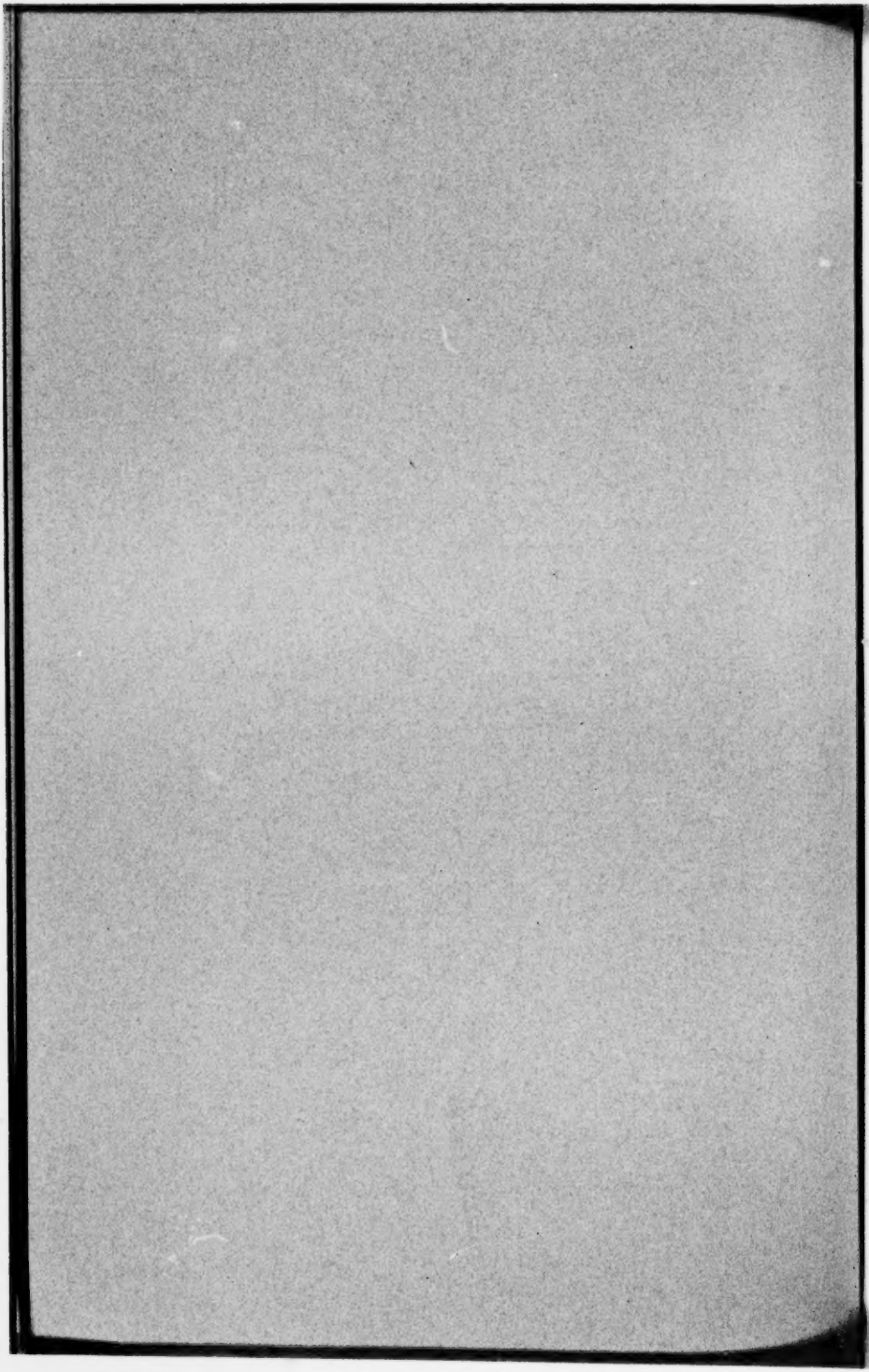

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"HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others,

Respondents

(Libellants-Appellees below).

(CONSOLIDATED CAUSES)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered March 14, 1944 (R. 1276) affirming interlocutory decrees of the United States District Court for the Southern District of New York in favor of the respondents.

Jurisdiction.

The date of the decision of the Circuit Court of Appeals is January 5, 1944 (R. 1269). On January 17, 1944, the petitioners filed a petition for a rehearing and the said petition was denied on February 23, 1944 (R. 1275). The decree of the Circuit Court of Appeals is dated March 14, 1944 (R. 1276). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

These suits (five in all) were brought against the steamer *Otho* and the petitioners, owner and agent of the vessel, respectively, for loss of and damage to cargo carried on the *Otho's* voyage from West African ports to New York, which ended on January 17, 1941. The damages demanded aggregate $514,420, but the bonds for the release of the *Otho* were by agreement fixed at $302,700. The cases were consolidated for the purpose of appeal and the consolidation was extended to include proceedings on certiorari (R. 1277).

The *Otho* sailed from New York on October 31, 1940, on her outbound voyage to Africa. She discharged cargo at numerous African ports and turned around for her homeward voyage at Matadi, Belgian Congo. From there she took on cargo along the African coast and sailed from Freetown, Sierra Leone, for New York on December 27, 1940.

On January 11, 1941, the *Otho* encountered a storm which lasted about four days. It was a storm of wide area, peculiar characteristics and catastrophic violence. Its unusual feature was the high and dangerous seas, which

reached a height of 35 to 40 feet (Smith, R. 234-239). The *Otho* hove to at 4:30 P. M. on January 11th and remained hove to until midnight on the 14th, covering 77 miles during that period (Smith, R. 234, 235, 239).

The ship's launch, 30 feet long and weighing about five tons, which was secured on the forward well deck, was broken in half on January 12th. The forward half was washed overboard immediately and the after half, after pounding around the deck for some time, was finally swept away (Smith, R. 239; Printzlau, R. 456). The big seas also broke a wire reel on the forecastle head, tore away three locking bars over the No. 1 hatch, damaged five sections of pipe guards, displaced the after deck load of logs, carried away the ship's bell and standard, and sprang the bridge deck and forecastle head doors (Smith, R. 239, 240; Printzlau, R. 453-457; Raymond, R. 534-538, 590-594).

On the morning of January 13th it was observed that the *Otho* was down by the head. Following a conference of the officers, Printzlau, the chief officer, examined the forepeak and found no water there, so the natural conclusion was that water was coming into the No. 1 hold (R. 241). Soundings could not be taken as the decks were awash. In an effort to lighten the ship and even her trim, 870 tons of palm oil were pumped out of the deep tanks and 300 tons of water were pumped into the afterpeak tank. This steadied the *Otho* some, but she still was in grave danger (R. 240-242).

The *Otho's* pumps of course could not take care of the great influx of water. Therefore, on January 14th, ten rivets were cut out of the bulkhead separating the forepeak from the No. 1 hold and a three inch line leading from the forepeak to the port double bottom tank was disconnected. This permitted the water to flow from the hold into the forepeak and thence into the double bottom tank where it was pumped out with the ballast pump (Yanez, R. 201).

The master of the *Otho* advised his owners of the ship's peril and the owners summoned aid. The Coast Guard cutter *Mendota* came to the assistance of the *Otho*, arriving at 11:40 P. M. on January 14th and accompanying the *Otho* until January 17th, when the cutter *Champlain* arrived and escorted the *Otho* up to the Ambrose Light vessel. The *Otho* arrived at New York almost 4½ days late (Smith, R. 234-251; Printzlau, R. 453-466; Raymond, R. 534-538; 590-594).

The testimony of the ship's officers as to the severity of the storm was corroborated by third officer Gordon L. Brion of the steamer *Santa Rosa* (R. 206-213), Captain Benjamin Bogdan of the steamer *West Kebar* (R. 407-417), the log books of three Coast Guard cutters, the *Spencer*, *Bibb* and *Hamilton* (Ex. EE.) and by Dr. James H. Kimball, head of the New York office of the United States Weather Bureau (R. 774-804).

The *Otho* was of the Isherwood design, in which the primary shell framing runs fore and aft and the secondary stiffeners vertically. This system of framing is just the opposite of that in transverse ships (Wilson, R. 827).

On the *Otho's* arrival, a fracture 44 inches long was found in her H-3 plate, which was third plate from the stem in the starboard H strake, the strakes being lettered upward from the plate next to the keel plate (R. 129, 130). The fracture occurred just above the fifth longitudinal frame from the bottom of the hold (Sparrow, R. 135-137).

About a year before the *Otho's* voyage, the steamer *Zarembo*, also an Isherwood ship owned by the petitioner, American-West African Line, Inc., met the same kind of an accident as that which befell the *Otho*. The *Zarembo*, while on a voyage from Africa to New York, ran into a storm and went down by the head. Later her starboard G-2 plate was found to be cracked in two places. A suit was brought for cargo damage and the ship-owner cross

libelled for general average contributions. Exactly the same issues were presented there as are presented here.

The District Court held that the accident was due to a peril of the sea and to latent defects in the plate which were not discoverable by the exercise of due diligence. It therefore dismissed the cargo damage libel and granted the carrier a recovery in general average. *The Zarembo,* 44 Fed., Supp. 915 (E. D. N. Y.). The Circuit Court of Appeals for the Second Circuit affirmed the decrees. *Balfour Guthrie & Co.* v. *American-West African Line,* 136 Fed. (2d) 320. This Court denied certiorari on January 10, 1944. *Balfour Guthrie & Co., et al.* v. *Steamship Zarembo,* No. 522, 88 Law. Ed. 375.

The cargo damage in the cases at bar falls into two general categories. The first category consists of the damage to the cargo in the No. 1 hold and tween decks, all caused by salt water which came through the fracture in the plate. It also includes the palm oil which was jettisoned from the deep tanks. The second category embraces the damage to the cargo in places outside of the No. 1 compartments. It is divided into four classes: (1) damage to the residue of the palm oil in the deep tanks through impregnation by salt and fresh water; (2) damage to cargo in the No. 2 tween decks and lower hold by salt water; (3) sweat damage to cargo in the No. 2 tween decks; and, (4) salt water damage to cargo in the bridge deck. Although the jettisoned palm oil was outside of No. 1, it is excluded from the second category as it logically belongs in the first category and will be so treated throughout this petition and brief.

We emphasize the distinction between these two general classes of damage because the law applicable to the first class may not necessarily apply to the second class.

Decisions Below.

The opinion of the District Court is printed on pages 1189-1203 of the record and is reported in 49 Fed. Supp. 945, under the title of *The Otho*. The Court's findings of fact and conclusions of law are printed on pages 1204-1224 of the record. The opinion of the Circuit Court of Appeals is printed at pages 1269-1273 of the record. It is reported in 139 Fed. (2d) 748. *Huilever S. A. etc.* v. *The Otho, et al.*

The District Court indicated that it thought the storm to be a sea peril but did not make an express finding as to this because it concluded that the fracture in the plate had started to develop before the storm (*infra*, p. 25). The same Court, however, in a later case against the steamer *West Kebar*, 1943 A. M. C. 1413, which also was in this storm, held the weather to be catastrophic.

The Court found that the *Otho* was not seaworthy with respect to the H-3 plate when she left New York in October, 1940. It held that in view of her age and the fact that the cracked plate was one of her original plates and that the forward plates of Isherwood ships had developed a tendency about 1937 to crack from deterioration due to corrosion and panting (the weaving of the plates about the longitudinals in a seaway), and in further view of the *Zarembo* accident, the petitioners had not used due diligence to make the *Otho* seaworthy and that the plate fractured as a result thereof (R. 1202).

As to the cargo outside of the No. 1 hold and tween decks the Court's view, judging as best we can from the enigmatic language of its opinion, which was not clarified by its findings, seemed to be that part was due to sea peril and part to unseaworthiness. Because the petitioners had not, at the trial, submitted evidence as a basis of an apportionment of such damage the Court held the ship and the petitioners liable for all of it (R. 1202, 1203). Although

it did not cite *Schnell* v. *The Vallescura*, 293 U. S. 296, it is evident that it had that case in mind.

The Circuit Court of Appeals said that the District Court's finding "that the plate cracked under the stress of ordinary seas and weather because of its weakened and wasted condition from corrosion and panting" was "clearly supportable" (R. 1270). The Court further stated that it could not say that the District Court's finding that the petitioners failed to exercise due diligence to make the *Otho* seaworthy was clearly wrong (R. 1271). It thought that it was not unreasonable for the trial Court to infer from the evidence that the defect in the plate could have been detected by the exercise of greater diligence in examining the No. 1 hold before the commencement of the voyage (R. 1272).

Although the Circuit Court but a short time before had decided *The Zarembo* in favor of the same carrier, its justification for the two opposing decisions on practically the same state of facts was that it could not insure uniformity in the decisions of District Courts on factual issues even though the facts are similar or even virtually identical (R. 1272).

The Court also said that the District Court's findings that the damage to cargo outside of No. 1 was causally related to the fracture are "supportable" and not "clearly erroneous" (R. 1273). Although the District Court's opinion, as we have observed, was very confusing as to liability and non-liability for damage to this particular cargo and although the findings and conclusions were still more confusing, the Circuit Court said that the petitioners could still apportion the damages before a Commissioner (R. 1273). But it laid down no criterion by which an apportionment could be made. In our petition for a rehearing we pointed out the confused state of the record and again questioned the District Court's conclusions as to causal relation with respect to this cargo, but the petition was denied (R. 1275).

Statute Involved.

The statute involved is the *Carriage of Goods By Sea Act*, 46 U. S. C. A. Sections 1300 *et seq.* The pertinent provisions of the Act are as follows:

> Section 4, paragraph 1, (§ 1304-(1))—UNSEAWORTHINESS: Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, * * *. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.
>
> Section 4, paragraph 2 (§ 1304(2))—UNCONTROLLABLE CAUSES OF LOSS: Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (c) Perils, dangers, and accidents of the sea or other navigable waters;
>
> (p) Latent defects not discoverable by due diligence.

Questions Presented.

As to All the Damaged Cargo.

1. Is it proper for a federal Appellate Court to accept a District Court's findings of fact merely on the ground that they are supportable by evidence?

2. Is not the correct rule the one that requires that the trial Court's findings of fact must be supported by the clear weight of the evidence before the Appellate Court is justified in accepting them?

3. Was the Circuit Court's refusal to follow its previous decision in *The Zarembo,* involving virtually the same state of facts as the cases at bar, justifiable on the ground that it was required to accept the trial Court's findings as to latent defects and due diligence, even though opposite to those in *The Zarembo?*

4. Could the lower Court properly decide these cases against the petitioners after deciding *The Zarembo* in the ship-owner's favor?

5. Were not the trial Court's findings of fact clearly erroneous unless supported by the clear weight of the evidence instead of being supported merely by evidence?

6. Was not the District Court's failure to find that the defect in the *Otho* plate was a latent one not discoverable by due diligence clearly erroneous, particularly in the light of the earlier *Zarembo* decision?

7. Were the findings of the lower Courts that the fracture commenced to develop before the storm supported by the weight of the evidence or by any substantial evidence whatever?

As to the Damaged Cargo Outside of the No. 1 Compartments.

8. Is it not necessary under the Carriage of Goods By Sea Act that there be a causal relation between unseaworthiness of the carrying vessel and damage to cargo stowed therein, in order to entitle the cargo-owner to a recovery?

9. Did not the respondents, under the Carriage of Goods By Sea Act, have the burden of establishing that the damage to the cargo carried in places other than the No. 1 hold and tween decks was causally related to the fracture in the H-3 plate?

10. Was any causal relation shown between the fracture in the H-3 plate and the damage to the cargo outside of the No. 1 compartments?

11. Was not the damage to all the cargo outside of the No. 1 compartments proximately due to a peril of the sea?

12. If the cause of the damage which was sustained in the first instance by the cargo outside of the No. 1 compartments was a sea peril and such damage was subsequently aggravated when the vessel went by the head, was not the proximate cause of all such damage nevertheless a peril of the sea?

13. Where cargo has been damaged partly through sea peril and partly through unseaworthiness, is the burden still upon the carrier, in view of the Carriage of Goods By Sea Act, to make an apportionment as between exempt and non-exempt damage in order to avoid being held liable for all the damage?

14. Has the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296, as to the carrier's duty of apportioning the damages between exempt and non-exempt classes, survived the Carrier of Goods By Sea Act in the case of cargo damage partly due to sea peril and partly due to unseaworthiness?

15. Did the lower Courts provide any basis by which an apportionment of the damages could be made in any event? If not, should not the decisions, findings, and conclusions be clarified by defining what is exempt and what is non-exempt damage, to the end that an apportionment can be made?

Specifications of Error to Be Urged.

As to All the Damaged Cargo.

The Circuit Court of Appeals erred:

1. In holding that the District Court's finding that the crack in the plate started to develop before the storm was clearly supportable by the evidence.

2. In holding that the District Court's finding that the petitioners failed to exercise due diligence to make the *Otho* seaworthy was not clearly wrong.

3. In holding that it was not unreasonable for the District Court to infer that the defect in the H-3 plate could have been detected by the exercise of greater care in examining the No. 1 hold before the voyage in question.

4. In failing to follow its previous decision in *The Zarembo,* 136 Fed. (2d) 320.

5. In failing to hold that the findings of fact of the trial Court must be supported by the clear weight of the evidence instead of merely by evidence, in order to justify their acceptance by an Appellate Court.

6. In failing to hold that the findings of the District Court that the defect in the H-3 plate was not a latent one and could have been discovered by the exercise of due diligence were contrary to the weight of the evidence, and therefore clearly erroneous.

7. In failing to hold that the damage to the cargo was due either to a peril of the sea or to a latent defect in the H-3 plate, or both, and to exonerate the petitioners and the *Otho* from any liability therefor.

As to the Cargo Outside of the No. 1 Compartments.

8. In failing to hold that a causal relation between the alleged unseaworthiness of the *Otho* and the damage to

this cargo must, under the Carriage of Goods By Sea Act, appear before the petitioners can be held liable therefor.

9. In failing to hold that the burden of establishing such a causal relation is placed upon the cargo-owner by the Carriage of Goods By Sea Act and that the respondents failed to sustain such burden.

10. In holding that the findings of the District Court that the damage to this cargo was caused or contributed to by unseaworthiness of the *Otho* were supportable.

11. In failing to hold that the proximate cause of all the damage to this cago was a sea peril, regardless of whether such damage was subsequently aggravated by conditions resulting from the fracture in the plate.

12. In failing to exonerate the petitioners from all liability with respect to this cargo.

13. In failing to hold that it was not incumbent upon the petitioners, in view of the Carriage of Goods By Sea Act, to make an apportionment as between exempt and non-exempt damage to this cargo, as a condition of securing exoneration from liability.

14. In failing to hold that the rule of *Schnell* v. *The Vallescura,* 293 U. S. 296, has not survived the Carriage of Goods By Sea Act in cases where cargo damage is due in part to sea peril and in part to unseaworthiness.

15. In failing to hold that the burden of making such an apportionment is now upon the cargo-owner, in view of the Carriage of Goods By Sea Act.

16. In failing in any event to modify the decision and decrees of the District Court so as to define clearly a line of demarcation between exempt and non-exempt cargo damage, as a basis for making an apportionment.

Reasons for Granting the Writ.

1. The Court below, in holding that the trial Court's findings must be accepted, if supportable, instead of holding that the findings, to be accepted, must be supported by the clear weight of the evidence, has rendered a decision which is in conflict with decisions of the Circuit Courts of Appeals for the First and Eighth Circuits, in *Fleming* v. *Palmer*, 123 Fed. (2d) 749 (C. C. A. 1), and *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.*, 111 Fed. (2d) 412 (C. C. A. 8).

2. The Court below, in deciding the present cases in a way directly opposite to its decision in *The Zarembo, supra*, has brought about the anomaly of two opposing decisions in the same circuit on virtually the same facts, which, we believe, necessitates a review by this Court.

3. The Court below, in accepting the conflicting findings of two trial Judges on substantially the same facts has unjustifiably extended the rule as to accepting findings on factual issues by trial Judges.

4. It is desirable that this Court settle the apparent conflict which now exists in the circuits as to whether it is sufficient that the trial Judge's findings be supported merely by evidence or whether they must be supported by the clear weight of the evidence, in order to warrant their acceptance on appeal. The Court here plainly indicated that a finding is acceptable if it has any support in the evidence.

5. Both lower Courts were clearly in error in finding that the crack started to develop in the H-3 plate before the storm.

6. Both lower Courts were clearly in error in failing to hold that the defect in the H-3 plate was a latent one not discoverable by due diligence.

7. It is important that this Court settle the question as to whether the Carriage of Goods By Sea Act changed the law as it was under the Harter Act and now makes it necessary that a causal relation between unseaworthiness and cargo damage exist as a condition of imposing liability for such damage on the carrier.

8. It is important further that this Court decide who has the burden with respect to such causal relation under the 1936 Act; that is, whether the cargo-owner must establish a causal relation or whether the carrier must show the absence of a causal relation.

9. The decision below is clearly erroneous in holding the petitioners liable for all the damage to cargo outside of the No. 1 compartments on the ground that it was caused or contributed to by the unseaworthiness of the *Otho*.

10. The Court below, in failing to hold that the proximate cause of all the damage sustained by the cargo which was in other places than the No. 1 hold and tween decks was due to a peril of the sea, even though the damage may have been aggravated after the *Otho* went by the head, has rendered a decision which is in conflict with the decisions of this Court in the *G. R. Booth*, 171 U. S. 450, *Insurance Co.* v. *Boon*, 95 U. S. 117, *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, and *Insurance Co.* v. *Tweed*, 7 Wall. 44.

11. These cases also bring up for review the question as to whether, since the passage of the Carriage of Goods By Sea Act, the carrier is required to segregate the damage to cargo due partly to sea peril and partly to unseaworthiness or else be held liable for all the damage under the rule of *Schnell* v. *The Vallescura*, *supra*. The further question arises as to whether the burden of making such a segregation is not now upon the cargo-owner in view of the 1936 Act.

12. Although the Circuit Court agreed with the District Court that the petitioners were not liable for some of the

damage to the cargo outside of the No. 1 compartments, it refused to establish a criterion by which an apportionment could be made, as a result whereof the petitioners have no guidepost for the making of an apportionment, if the burden is still upon them to do so. This error should be corrected by this Court on a review by certiorari.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said consolidated causes may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, March 24, 1944.

AMERICAN-WEST AFRICAN LINE, INC.
BARBER STEAMSHIP LINES, INC.
Petitioners,

By JOHN W. CRANDALL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point applies to all the cargo which was damaged. The succeeding four points, however, deal only with the cargo which was carried in places outside of the No. 1 hold and tween decks.

Point I emphasizes the conflict in the circuits as to what evidence is sufficient to make a finding acceptable on appeal. It also discusses the conflict between this decision and that in *The Zarembo* and shows how manifestly erroneous were the decisions of the lower Courts here (pp. 18-27). Point II discusses the necessity of showing a causal relation between the damage outside of the No. 1 compartments and the alleged unseaworthiness of the *Otho* and the burden of proof with respect thereto, in the light of the 1936 Act (pp. 28-34). In Point III we argue that all the damage in the second category was proximately due to a sea peril, even though it may have been aggravated later when the vessel went by the head (pp. 34-37). Point IV is concerned with *Schnell* v. *The Vallescura*, *supra*, and questions its applicability since the passage of the 1936 Act (pp. 37, 38). In Point V we have pointed out the confused state of the record, due to the Court's failure to prescribe a criterion by which a segregation of damages can be made (pp. 39, 40).

POINT I.

The Circuit Court's affirmance of the District Court's decrees, notwithstanding its affirmance of contrary decrees in the *Zarembo*, and its application of a different rule from that prevailing in other circuits as to accepting a trial Court's findings, make a review of the present cases by this Court advisable.

The anomaly presented by opposing decisions in the same circuit in two cases whose facts to all intents and purposes are identical is so unusual that it justifies, we submit, a review of the cases at bar by this Court and the setting aside of the findings of the lower Courts, in order that the conflict may be resolved. A review is advisable further because the rule applied here by the Circuit Court as to the acceptance of the trial Court's findings is opposed to the rule in some of the other circuits, as we shall presently show.

It would be difficult to find cases more on all fours with each other than the *Zarembo* and the present cases.

The two ships were sister ships of the Isherwood design, with longitudinal framing, and were about the same age. Each was engaged on a voyage from Africa to New York when the accident occurred. The *Zarembo's* G-2 plate cracked in two places and the *Otho's* H-3 plate cracked once. If there are any differences in the cases they lie in favor of the *Otho*, for the storm which she encountered was of catastrophic proportions, and her H-3 plate concededly was a much better plate than the G-2 plate of the *Zarembo*.

The inspections of the two ships before their voyages were in substance the same. (Note: References in this paragraph to the *Zarembo* record, which is on file with this Court, will be preceded by the letter "Z"). The lower Courts here made much of the fact that Sparrow and Gledhill, the petitioners' marine superintendent and superin-

tendent engineer respectively, did not examine the shell plating in the No. 1 hold of the *Otho* from the longitudinals. But neither did they in the *Zarembo*. They made their inspections mostly on the outside, as they did here (Sparrow, Z. R. 330, 331; Gledhill, Z. R. 305). Narter, surveyor of the American Bureau, did examine the plating inside the *Zarembo's* No. 1 hold but used his testing hammer only where he thought it advisable (Z. R. 263-266). Narter's examination was substantially the same as the examination which Paul, surveyor for the Bureau of Marine Inspection and Navigation, made of the *Otho* (R. 914-937). J. D. Wilson, American Bureau surveyor, inspected the *Zarembo's* plating outside (Z. R. 958-962), and Lucey, also an American Bureau surveyor, did the same on the *Otho* (R. 261-265). Kelly, the United States Inspector, only examined the *Zarembo's* plating outside (Z. R. 1156, 1157), whereas Paul inspected the *Otho's* plating both outside and inside. The master and chief officer of the *Zarembo* inspected her No. 1 hold plating on the African coast from the longitudinals, with the cargo battens up (Z. R. 868-870), while Printzlau, the *Otho's* chief officer, examined the *Otho's* inside plating from the longitudinals four times on the African coast during cleaning and painting operations. The cargo battens were down at the time (R. 446-450; 468-476). More persons may possibly have seen the *Zarembo's* plating outside, but there is little to choose between the examinations of the plating of the two vessels.

The District Court, in *The Zarembo*, 44 Fed. Supp. 915 (E. D. N. Y.), in holding that the petitioners here had used due diligence to make the *Zarembo* seaworthy, said (p. 919):

> "Libellant makes a point of the finding of the wastage in plates F-1, and contends that by reason thereof a more careful examination of the plates, including the G-2 plate, should have been made, but it seems to me that the finding of these F-1 plates in the usual way shows that the examination was not merely perfunctory, but of a kind to develop defects.

> From the foregoing it seems clear that inspections were carefully made in the usual and approved manner.
>
> The mere fact that there may have been an unobservable defect in the G-2 plate, due to its having thinned more than 25% of its original thickness, does not entitle the libellants to recover, as it was to relieve a ship or its owner from such a situation, that the Harter Act and the Carriage of Goods By Sea Act were enacted, which give exemptions from such liability if due diligence was exercised to make the vessel seaworthy.
>
> Of course the duty to exercise due diligence cannot be delegated, nor is there any attempt to do that here, but it is difficult to understand how the ship, or her owner, could have been more diligent. It would be difficult to suggest more competent persons to make such inspections than the surveyors of the American Bureau of Shipping, the United States Government Inspectors of the Department of Commerce, the Port Engineer and Marine Superintendent of the claimant, and the officers of the ship itself, all of whom, without exception, say that they saw no excessive corrosion or groove, in the G-2 plate, and of course the thinness of the plate could only have been found by drilling, which certainly could not have been required, unless something appeared to the eyes which required it."

The Court further held (p. 920) that the condition in the *Zarembo's* G-2 plate which led to the fracture was a latent defect not discoverable by due diligence.

The Circuit Court, considering the *Zarembo* case (136 Fed (2d) 320), said (p. 321):

> "There is no doubt that in fact the ship was unseaworthy at the time she sailed. Her plating where it cracked was worn thin in excess of 75 per cent., though, of course, this is hindsight; the maximum wear considered safe is 25 per cent. Only if due diligence was exercised to make the ship seaworthy can her owner be exculpated from liability."

After referring to the inspections of the *Zarembo* which we have mentioned, the Court said further (p. 321):

> "What would thus appear ordinarily sufficient as an exercise of due diligence disclosed no flaws, with the exception of some corrosion on the plate adjacent to the one which cracked; the survey report of January, 1939, recommended its renewal within a year. But from this and from a warning of the American Bureau of Shipping, dated May 20, 1937, to all surveyors, that longitudinally framed ships like the 'Zarembo' should be watched for grooving and corrosion, libellants contend that yet more stringent tests should have been applied. No practical tests, however, are proposed. And as the district court not unreasonably suggested, the warnings, in so far as they are given any effect, probably spurred the surveyors on to exercise even more care in the tests actually employed. In any event we need not go further into the niceties of examinations for seaworthiness, for enough has been said to show that the district court's findings of due diligence were by no means clearly erroneous."

The District Court here was influenced (R. 1202) by the circular which the American Bureau issued on May 20, 1937 (R. 1200, 1201), cautioning its surveyors to be on the lookout for corrosion and grooving along the tops of the longitudinals of Isherwood ships, because of one or two fractures which had shortly before developed in the shell plating of ships of this type. But as the Circuit Court commented in the *Zarembo*, the effect of this circular undoubtedly was to spur the Bureau surveyors on to exercise even more care in the tests applied. As the Court remarked, no practical tests, beyond those already used, were proposed. And neither were any proposed here.

The problem of discovering in advance conditions which may lead to plate fractures in ships has been a peculiarly baffling one. These fractures are due principally to panting, which produces fatigue in the steel. When a vessel is mov-

ing ahead in the seas her bow pitches down into the water and then emerges, causing an alternate pressure and release of pressure, which, combined with the ship's forward motion, produces an inward and outward movement of the forward shell plating which is called panting. In Isherwood ships the plates flex above and below the longitudinal frames (Jordan, R. 298; Haight, R. 735, 736; Wilson, R. 827).

The alternating cycles of stress produce fatigue in the forward plates. The stresses are intensified at the fulcrum, which is the frame, and there is thus an uneven distribution of the stresses through the plate, which sets up differences of electro-potential. With sweat or other moisture providing the electrolyte a multitude of minute galvanic batteries is created, bringing about corrosion through galvanic action. The fracture was caused by corrosion fatigue, which is fatigue combined with corrosion, and it is much more severe than ordinary fatigue (Stoughton, R. 638-650; Butts, R. 706-722; Wilson, R. 843-866).

The problem of panting in ships is one to which classification societies throughout the world have devoted much time and study. In efforts to solve the problem various expedients have been tried, the latest one being the use of thicker plating in the forward area, which it is hoped will prove to be the final solution (Wilson, R. 828).

Wilson, who is the assistant chief surveyor of the American Bureau, said that the Bureau has not yet been able to discover the effects of panting along a longitudinal member, but is confident that a method of doing so will sometime be found (R. 867). The Bureau suddenly faced the problem of failures of ships' plating in the way of the No. 1 hold along the longitudinals about 1937 (Wilson, R. 867, 868). Before those failures occurred, it had been extremely difficult, if not impossible, for the Bureau's surveyors to find any evidence that would enable it to predict the location or time of a plate failure. It was then assumed that there must be a sharp grooving at the top of a longitudinal frame

that could easily be located in anticipation of a failure, because after the fracture occurred there was an obvious deterioration at the edge of the crack which indicated that the plate might have been grooved prior to its failure. The Bureau therefore instructed its surveyors to search carefully for such evidence, and the surveyors tried to chip the plates to see if there was any accumulation of dirt or other substances that would conceal such corrosion. But the problem was not solved. The surveyors could not find any such grooving (R. 869, 870, 883-887).

Wilson said the corrosion fatigue cannot be seen (R. 897); that even when it is progressing through the wall structure of the steel the steel can be chiseled and still present a bright appearance (R. 870). After an exhaustive study of panting and plate fractures, he came to the conclusion that a groove, as distinguished from the ordinary wastage in a plate, which he characterized as a fillet, comes after and not before the fracture. After the fracture has occurred, the material at the edge of the crack, due to the softening effect of the water flooding the ship, disappears and leaves a chisel-like edge in the plate (R. 883, 884).

The Circuit Court laid stress on an examination which Narter made of the plating inside the No. 1 hold after the *Otho's* arrival, and on which he found grooving in a number of plates along the longitudinals (R. 1272; Narter, R. 358-364). It concluded from this that it was not unreasonable for the District Court to infer that the defect in the H-3 plate could have been detected by the exercise of greater care in examining the No. 1 hold before the voyage (R. 1272). In so concluding the Court apparently disregarded entirely the fact that Narter's inspection was made under entirely different conditions from those existing when the plating was previously inspected. The hold had been full of water from January 13th until January 21st. This water unquestionably had attacked the sound metal underneath the surface scale, which, although hard

and adherent, was slightly porous, and forced it off, so that grooves were exposed to view. Narter conceded that the soaking of the plates in the salt water had loosened the scale and made the grooving much easier to detect. A substantial number of the plates he referred to as grooved appeared to be entirely sound until he had dug out a hard flint-like substance with the pointed end of his hammer and this, it should be remembered, was only after the soaking of the plates in water for many days (Stoughton, R. 648, 649; Butts, R. 713; Wilson, R. 849, 850; Narter, R. 376-381). The question, of course, is not what Narter could see or find on the shell plating after it had been soaked in water for over a week, but what Printzlau and Paul could see on the plating under normal conditions.

Counsel for the respondents have argued, and the District Court seems to have been unduly influenced by the argument (R. 1202), that the accident to the *Zarembo* was a warning to the petitioners, which should have impelled them to do still more than was done in the way of inspecting the *Otho* before the voyage. The basis of the argument is that what was sufficient to constitute due diligence in the case of the *Zarembo* was insufficient in the case of the *Otho* because of the prior accident. This argument is highly fallacious and treats the *Zarembo* case as though it was the first instance of a plate fracture in a ship. This was far from being so (Wilson, R. 867, 868). During the ten years preceding the trial Wilson had personally investigated about two dozen cases of plate fractures, some before and some after the *Zarembo* (R. 885, 886). If "warning" is the correct word, the *Zarembo* accident was no more of a warning than were the plate fractures preceding the *Zarembo*. The American Bureau, as we have shown, was very much on its guard from the start, and its surveyors made determined efforts to discover conditions which might lead to fractures, but unsuccessfully. The problem, which our opponents try to oversimplify, was in reality an extremely difficult one.

The issue as to whether the fracture developed before or after the storm, which the lower Courts also decided adversely to the petitioners, is really not the crucial point in the cases, for in the final analysis they narrow down to the question as to whether the defect in the plate was latent or not. We should point out, nevertheless, that the District Court's finding that the crack started to develop and was causing some leakage into the No. 1 starboard bilge before the storm flies squarely in the face of the testimony of the respondents' only metallurgist, Tour. He said that the development of the crack was in length and not in depth; that when it was a few inches long it was some thousands of an inch wide; that there was no gradual penetration through the width of the plate; and that laterally the fracture took place all at once (R. 981, 982). And the great influx of water, which put the ship by the head on January 13th, fixes the time when the plate cracked through. The District Court's finding No. 25 (R. 1209) that the plate was cracked and water was entering the No. 1 hold before the storm is therefore absolutely contrary to the evidence.

From our recital of the facts, the error of the lower Courts in finding that the defect in the *Otho's* plate was not a latent one appears plain. The error stands out even more clearly when the finding is contrasted with the *Zarembo* finding that the defect was latent, it being conceded that the *Zarembo's* plate was in nowhere near as good condition as the *Otho's* plate was.

Both plates were examined together in the presence of the Court at a session of the trial held at the Pier Machine Works in Brooklyn. The petitioners' experts pointed out that the grooving in the *Zarembo* plate was deeper, more extensive and much more pronounced than the grooving on the *Otho* plate (Stoughton, R. 554; Haight, R. 586, 587; see also, Butts, R. 706; Wilson, R. 842). The respondents' experts were present but never contradicted the above testimony. As a matter of fact the *Otho* plate, before the frac-

ture, would not have been subject to condemnation by the American Bureau, as deterioration had not progressed to a point where renewal was called for by the Bureau's rules (Wilson, R. 899, 830-838).

The Circuit Court, in deciding these cases as it did after holding the opposite way in the *Zarembo,* said that it applied the same rule in both cases with regard to accepting findings of fact by trial Courts and that, as an Appellate Court, it could not insure uniformity in the decisions of the District Courts on issues of fact, even though the facts in two cases might be identical (R. 1272). But we do not believe that there can be any justification for a rule or practice which would lead to the present anomalous situation, where the defects in the two plates were due to the same cause and yet the defect in the inferior plate was found to be latent while that in the better plate was found to be patent. There were many witnesses who testified in both cases. Surely they could not all be right in one case and wrong in the other. Furthermore, in view of the comparison of the plates to which we have just alluded, it verges on the absurd to say that the corrosion fatigue defect was invisible in one plate and visible in the other. If 15 men could not find the defect in the *Zarembo* plate, surely no one could be expected to find one in the *Otho* plate. The discovery of corrosion fatigue in a plate did not become any easier after the *Zarembo* accident. In short, the decision of the District Court in the *Zarembo* was supported by the weight of the evidence while here it was just the other way.

There is undoubtedly a conflict in the circuits as to the effect to be given to trial Court's findings on appeal.

In the Third Circuit the Court, in *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 Fed. (2d) 704 (C. C. A. 3), stated the rule in this way (p. 705):

> "So long, therefore, as a finding of fact is supported by evidence and is not clearly erroneous it is to be accepted on appeal as verity."

On the other hand in the First Circuit the Court, in *Fleming* v. *Palmer*, 123 Fed. (2d) 749, stated the rule in these words (p. 751):

> "A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence."

The rule as last stated also prevails in the Eighth Circuit. *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.*, 111 Fed. (2d) 412, 415 (C. C. A. 8).

The Circuit Court, in the cases at bar, seems to have followed the Third Circuit rule. Again and again it said that the District Court's findings will be sustained if they are "supportable." They must be more than "supportable," we submit. They must be supported by the clear weight of the evidence and they were not so supported here. On the contrary, they were, we believe, plainly against the clear weight of evidence.

Because of the conflict in the circuits just mentioned and because of the Circuit Court's unjustified acceptance of findings which were clearly erroneous and its refusal to follow its decision in *The Zarembo*, we respectfully submit that these cases should be reviewed by this Court on certiorari, in order that these errors may be rectified.

POINT II.

The Court below erred in failing to hold that the respondents, under the Carriage of Goods By Sea Act, had the burden of showing a causal relation between the alleged unseaworthiness of the *Otho* and the cargo damage outside the No. 1 compartments and that they failed to sustain this burden.

A most important fact to bear in mind in connection with this damage is the date when the *Otho* went by the head. The respondents' proctors contended that it was on January 11th. Printzlau, the chief officer, so testified at first, but did so under a misapprehension and corrected his testimony and said that it was on the morning of January 13th when the *Otho* was found to be by the head and was observed to be acting sluggishly (R. 509-511). The District Court accepted January 13th as the date (R. 1192, 1193; Finding No. 24; R. 1208). If the *Otho* had gone by the head earlier her officers of course would have noticed it.

Although the full force of the storm did not strike the *Otho* until the 12th, the weather was bad all day on the 11th. The seas in fact were rough through most of the night of January 10th/11th (Raymond, R. 535, 536; Printzlau, R. 453; Smith, R. 233). The storm center passed the *Otho* in the late forenoon of January 11th at a distance of 50 miles (Kimball, R. 786, 806). The liner *Santa Rosa*, which was 320 miles away from the *Otho* at noon (Bogdan, R. 419) was forced by the heavy seas to heave to at 8:34 A. M. (Brion, R. 207). The decks of the *Otho*, which was fully loaded, were therefore awash all day of the 11th.

We shall now consider the four classes of damage in this category.

First: *The damage to the residue of the palm oil in the deep tanks.* This oil was impregnated by salt and fresh

water. The salt water entered through rivets in the shell plating which were loosened by the vessel's straining in the heavy seas (Jordan, R. 296, 297; Cocks, R. 427). The fresh water came through the joints of the steam heating coils where a leak developed, again as a result of straining in the heavy weather (Cocks, R. 428). All deep tanks had been thoroughly tested before the oil was loaded and were certified to be in a fit condition to carry palm oil (Printzlau, R. 482-484; Log entries (Ex. W.) for December 2, 3 and 6, 1940).

Second: *Salt water damage in the No. 2 tween decks and lower hold.* This damage was due to the tearing of the No. 2 hatch tarpaulins, which occurred on January 12th. When the launch was smashed by the heavy seas that day its after section, while pounding around, tore the tarpaulins on the No. 2 hatch. They were ripped and chafed through on the after port side of the hatch so that sea water got in and damaged the cargo in that hatch (Finding No. 73, R. 1221; Smith, R. 239; Printzlau, R. 456, 463; Hull, R. 1093; Cocks, R. 423-426).

Third: *Sweat damage in the No. 2 compartments.* Some of the damage in the No. 2 tween decks was caused by sweat which, as is well known, is produced by the difference in temperatures inside and outside of a ship's hold and is common in the winter when ships pass from warm to cool weather (Cocks, R. 425; Printzlau, R. 464).

The No. 2 hold was equipped with three ventilators, one forward and two aft, which telescoped into the tween decks. On Sunday morning, January 12th, the after ventilator of the No. 1 hold and the forward ventilator of the No. 2 hold were unshipped and the stumps were plugged with wooden plugs and covered with canvas. They were lashed at the base of the foremast. One was washed overboard the same day and the other two days later (Hull, R. 1096, 1097; Bower, R. 1110, 1115; Maier, R 1117; Smith, R. 243;

Printzlau, R. 463, 464). The removal of the No. 2 ventilator prevented the free circulation of air through the No. 2 compartments, and this, combined with the sea water which entered No. 2, accelerated the formation of sweat (Cocks, R. 431; Printzlau, R. 464). Since it was a sea peril which prevented the proper ventilation of this cargo, the sweat damage was due to a sea peril. *The Zarembo, supra; Clark* v. *Barnwell*, 12 How. 272; *Wessels, et al.* v. *The Asturias*, 126 Fed. (2d) 999 (C. C. A. 2).

Fourth: *Damage to cargo in the bridge deck.* Two consignments of chillies (peppers) stowed in the bridge deck were damaged by sea water which entered through the bridge deck doors when they were sprung by the heavy seas on January 12th (Finding No. 74; R. 1221; Smith, R. 240; Jordan, R. 293; Cocks, R. 431).

The District Court held that the stowage of the cargo in the No. 2 compartments and in the bridge deck was proper (Findings Nos. 76 and 77; R. 1221). No question of stowage arose with respect to the palm oil in the deep tanks.

We have, then, a situation where the originating factor in these four classes of damage (the storm) came into operation before the *Otho* went by the head on January 13th. The sea water poured into the No. 2 hatch and the bridge deck and sweat was forming in No. 2 tween decks on January 12th. If the weather on January 12th was severe enough to cause all the structural damage which was done that day (*supra*, p. 3), it obviously was heavy enough to loosen the shell plating rivets adjacent to the deep tanks and the deep tank heating coils.

The District Court's view, drawing the best inference we can from its vague remarks about an apportionment (R. 1203), presumably was that sea peril was the first cause of this damage and that subsequently the damage was aggravated when the ship went by the head. The puzzling thing about it all is that the Court, in Finding No. 71 (R.

1220), wherein it held the sweat damage in No. 2 attributable to the *Otho's* unseaworthiness, deliberately *excluded* the salt water damage in that hatch. There is no finding relating this salt water damage to the cracked plate. Then, strange to say, the Court found a causal relation between the fracture and the damage in the bridge deck (No. 72, R. 1220, 1221), although the No. 2 hatch tarpaulins and the bridge deck doors were damaged at about the same time.

The District Court was clearly right in excluding the salt water damage in No. 2 from its findings as to causal relation. But, equally clearly, it was wrong in finding a causal relation in the case of the other damage, for there was no reason for any distinction between the classes and the Court gave none.

While there was a causal relation between the cracking of the plate and the damage to the cargo in the No. 1 compartments and the jettisoning of the palm oil, the respondents utterly failed to show that the damage to the cargo outside of No. 1 resulted from the plate fracture. And the burden was on them to do so, we submit, under the Carriage of Goods By Sea Act.

This Court was not yet decided whether the 1936 Act changed the law established in *May* v. *Hamburg etc. Gesellschaft (The Isis)*, 290 U. S. 333, which held that it was unnecessary for a cargo-owner to show a causal connection between unseaworthiness and cargo damage in order to hold the carrier. In the absence of a pronouncement by this Court, however, it seems to be generally agreed that the *Isis* rule no longer prevails.

The exemptions in Section 3 of the Harter Act (46 U. S. C. A. § 192) were conditional. But those provided by Section 4, paragraph 2 of the 1936 Act are unconditional.

Section 4, paragraph 1, of the 1936 Act (46 U. S. C. A. § 1304(1)) provides in part as follows: "Neither the carrier nor the ship shall be liable for loss or damage arising or

resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy." This section is discussed in "Knauth on Ocean Bills of Lading," 1941 Edition, pages 124-126.

Deutsch, in his book entitled "Model Ocean Bill of Lading," states (p. 6):

> "In any event, assuming that the Carriage of Goods By Sea Act provides that the carrier shall not be liable for loss caused by unseaworthiness, unless the loss is caused by the carrier's want of due diligence to make his vessel seaworthy, the statute makes this important change in the American law in favor of the carrier. In other words, prior to the enactment of the Carriage of Goods By Sea Act, under the decision of the Supreme Court in the case of the *Isis, supra,* the carrier was liable for loss or damage to cargo, if he had failed to use due diligence to make his vessel seaworthy, whether the loss had any causal connection with the unseaworthiness or not. Under the generally accepted construction of the Carriage of Goods By Sea Act, the carrier is not liable in that case unless there is an actual causal connection between the lack of due diligence and the loss."

Furthermore, in the cases which have construed the Act to date, it has been held that the cargo-owner has the burden of showing that unseaworthiness in the ship caused the damage to his cargo.

In *The Aakre,* 31 Fed. Supp. 8 (S. D. N. Y.), affirmed 122 Fed. (2d) 469 (C. C. A. 2), the Court, considering a case arising under the Canadian Water Carriage of Goods Act, 1936, stated (p. 12):

> "It follows, and I hold, that under the provisions of the contract of carriage herein the burden was on the cargo to show that the ship was unseaworthy in some specified respect, which caused or contributed to the loss from one of the excepted statutory perils relied on by the ship-owner—which in this cause was

> stranding—an accident of the sea—due to negligent navigation."

In *The Temple Bar,* 45 Fed. Supp. 608 (D. C. Md.), the Court, comparing the Harter Act and the Carriage of Goods By Sea Act, said (p. 613):

> "By the 1936 Act, the vessel owner, while required to exercise due diligence in furnishing a seaworthy vessel, incurs no liability for loss arising even from unseaworthiness unless such is caused by lack of due diligence to make the vessel seaworthy. In short, the later Act, unlike the earlier one, does not condition its exemptions upon due diligence to make the vessel seaworthy, but only liability for loss due to unseaworthiness is so conditioned. • • •
>
> Therefore, to summarize, the following principles seem clear from the language of the Act: (1) The shipowner has the burden of proving that the vessel was seaworthy when she sailed, or that he had exercised due diligence to make her so; but (2) even if the shipowner fails in this proof, the claimant still cannot recover unless he sustains the burden of proving that the unseaworthiness did, in fact, cause the loss or damage in question."

See also, *The Thomas J. Howard,* 1943 A. M. C. 1263, 1273.

The word "unless" in Section 4 is particularly significant as showing where the burden lies. The Fire Statute, R. S. 4282 (46 U. S. C. A. § 182), provides an analogy. It exempts the ship-owner from liability for loss or damage arising by fire on the ship unless such fire is caused by the design or neglect of the owner. Under that statute the burden is upon the cargo-owner to show design or neglect. *The Salvore,* 60 Fed. (2d) 683 (C. C. A. 2); *The Older,* 65 Fed. (2d) 359 (C. C. A. 2).

Therefore, under the 1936 Act, as interpreted so far, the respondents had the burden of showing that this damage resulted from the crack in the plate. In order to sustain this burden, they at least had to show that the *Otho*

was by the head *before* January 12th, when the full force of the storm struck her and did the damage to the ship (*supra*, p. 3) which let the water into the places where this cargo was carried and made it necessary to reduce the ventilation in No. 2. They failed to meet their burden. The *Otho* went by the head on the 13th. The petitioners therefore in any case should have been exonerated from liability for the damage to all this cargo outside of No. 1.

POINT III.

The Court below, in failing to hold that the proximate cause of all the damage to this particular cargo was a peril of the sea, has rendered a decision which is in conflict with applicable decisions of this Court.

It is certain that the District Court, as evidenced by its remarks about sea peril and an apportionment of the damages (R. 1203), and its deliberate exclusion of the sea water damage in No. 2 from Finding No. 71 (R. 1220), was of the opinion that part of the present damage was proximately due to sea peril. The Court's reason for holding the petitioners liable for all this damage undoubtedly was due to its mistaken idea that *Schnell* v. *The Vallescura* required a segregation at the trial (*infra*, p. 39).

But the District Court's fundamental error, we believe, lay in its failure to hold that a sea peril was the proximate cause of *all* this damage, for it was the sea peril which first paved the way for the water to enter the No. 2 hatch, the bridge deck, and the deep tanks, and which necessitated the precaution of unshipping the two ventilators. If the damage was later increased when the vessel went down by the head, the proximate cause of all the damage, within the decisions of this Court, was nevertheless a sea peril.

In *The G. R. Booth,* 171 U. S. 450, the situation was just the reverse of the one here. There cargo was damaged by sea water which entered the ship through an opening produced by an explosion of 20 cases of detonators in the hold and the question was whether or not the loss was due to a peril of the sea. This Court held that the explosion, and not the sea water, was the proximate cause of the damage. It said (p. 460):

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. * * * There being two concurrent causes of the damage—the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause."

In *Insurance Co.* v. *Boon,* 95 U. S. 117, goods in a store in Glasgow, Mo. were insured under a policy exempting the insurer from liability for any loss or damage by fire happening by means of any invasion or of any military or usurped power. An armed Confederate force attacked the city and the commander of the Union forces set fire to the City Hall in order to prevent military stores therein from falling into the possession of the invaders. The fire spread from one building to another until it reached the store containing the insured goods and destroyed them.

This Court held for the insurers. It said (p. 133):

> "In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole. * * * Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers."

In *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, this Court said (p. 199):

> "But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. * * * And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant."

In *Insurance Co.* v. *Tweed*, 7 Wall. 44, cotton in a warehouse was insured against fire by a policy, which provided, among other things, that the insurer should not be liable for loss due to explosion. An explosion took place in one warehouse, causing a fire which spread to a second warehouse, and thence to a third warehouse which contained the insured cotton. This Court held that the loss of the cotton was due to the explosion.

See also *The Mohawk*, 8 Wall. 153; *The Munaires*, 1 Fed. (2d) 13 (C. C. A. 2); *The Strathdon*, 89 Fed. 374 (S. D. N. Y.).

Because of the conflict between the decision below and those of this Court in the respect mentioned, and because of the Court's failure to exonerate the petitioners and the *Otho* from liability for this damage on the ground that it was all proximately due to a peril of the sea, we submit that a writ of certiorari should issue to correct the error.

POINT IV.

The petitioners, in view of the change in the burden of proof made by the Carriage of Goods By Sea Act, should no longer be required to segregate exempt damage from non-exempt damage at the risk of being held liable for all, and the lower Courts erred in so holding.

Both lower Courts were of the view that the petitioners must apportion these damages or pay for everything, under *Schnell* v. *The Vallescura.* We do not think that this is so since the 1936 Act, which made a sweeping change in the law as to a carrier's liability where unseaworthiness is charged. It is therefore open to serious question whether the rule laid down in *The Vallescura* has survived the Act, at least insofar as a situation like this is concerned.

The Circuit Court of Appeals, in deciding *The Vallescura,* 70 Fed. (2d) 261 (C. C. A. 2), held that since the decay which damaged the onions came within a bill of lading exemption, the burden of proving negligence was on the cargo-owner, and therefore the cargo-owner was obliged to show what part of the decay was due to the carrier's negligence.

This Court reversed the Circuit Court on the ground that the state of the proof was such as to show that the damage was due either to decay, an excepted peril, or to the carrier's negligence and therefore the carrier must

bring itself within the exception or show that it had not been negligent.

Here the respondents charge unseaworthiness. But under the cases we have cited (pp. 32, 33) they must show that the unseaworthiness caused their damage. They are therefore in the position of a cargo-owner before the 1936 Act, whose damage was within an excepted cause, which required him to prove negligence on the part of the carrier. That was the basis on which the Circuit Court decided *The Vallescura.*

The reason why this Court decided *The Vallescura* as it did seems evident from the emphasis it laid on *The Folmina,* 212 U. S. 354, as a precedent. In *The Folmina,* cargo was damaged by sea water but the carrier failed to show how the water entered the vessel. It was held there that the carrier must show that the water came in as a result of a sea peril and that where the cause of the entry was not explained the carrier was liable.

Since the 1936 Act, as construed up to the present time, places the burden on the cargo-owner to show that his damage has resulted from the ship's unseaworthiness, where seaworthiness is the issue, there is a very serious question whether *The Vallescura* rule now applies to cases like those at bar. If we are correct as to this, the Courts below should have exonerated the petitioners from liability as to this cargo because the respondents failed to prove what part of the damage, if any, was traceable to the fracture in the plate.

The question presented under this point is clearly of sufficient interest and importance to merit review by this Court on certiorari.

POINT V.

The lower Courts, by failing to establish a criterion under which the damage can be segregated, have made it impossible for the petitioners, if the burden of making a segregation is still theirs, to secure exoneration as to any of the damage outside the No. 1 compartments. This manifest error should be corrected by this Court.

Should this Court disagree with all of our preceding contentions, the problem of apportionment would still remain.

The District Court held the petitioners liable for all this damage under the mistaken idea that they were required to separate the various classes of damage at the trial. This was plainly erroneous, for, as we pointed out on the appeal, the segregation question, on which *The Vallescura* was decided against the carrier, did not really come up until it was found impossible to segregate the damages before the Commissioner. The Circuit Court agreed with us, saying that the opportunity to make an apportionment will still be open to the petitioners before the Commissioner (R. 1273). But neither Court gave any clear indication as to which damage was considered exempt and which not. No general principle was laid down, so there is no way of knowing what to segregate. The record, in fact, is in a badly confused state on this point.

We are completely in the dark as to what the District Court had in mind when it said that it was unable to make an apportionment because of insufficient evidence (R. 1203). We do not know whether it was thinking about an apportionment as between the sweat and salt water damage in No. 2, or an apportionment as between damage caused by sea peril and any aggravation of such damage caused by the vessel's going by the head, or to all of them. The confusion was deepened by the Court's findings and conclusions, which remained unclarified in spite of our efforts to have them clarified.

In dealing with the damage in No. 2, for example, the Court found that only the sweat damage therein was attributable to the unseaworthiness of the *Otho* (Finding No. 71, R. 1220). The salt water damage was deliberately omitted, making the inference irresistible that the Court considered that damage to be due to sea peril.

In spite of its exclusion of the salt water damage in No. 2 from Finding No. 71, the Court proceeded to find that the sea water damage in the bridge deck was attributable to the cracked plate (Finding No. 72, R. 1220, 1221), although the damage to the bridge deck doors and the No. 2 hatch tarpaulins was caused by the seas at about the same time.

In Conclusion of Law No. 8 the Court held that all the damage involved in the litigation was caused by the *Otho's* unseaworthiness (R. 1222, 1223). And in Conclusion of Law No. 12 it said that the petitioners' failure to use due diligence to make the vessel seaworthy resulted in the damage to the cargo stowed outside the No. 1 hold (R. 1223).

In our petition for a rehearing in the Circuit Court we pointed out the inconsistency between the various findings dealing with this cargo and between Conclusions Nos. 8 and 12 and Finding No. 71 and also asked for a modification of the decrees to provide some clear basis for making an apportionment. But the Court denied our petition.

If this Court should disagree with our argument as to proximate cause in Point III (pp. 34-37) we respectfully ask that a writ of certiorari issue in any event and that the lower Court's decree be modified so that we may know where the line of demarcation is between the petitioners' liability and non-liability for the damage to the cargo outside of the No. 1 compartments, and be enabled to make an apportionment before the Commissioner accordingly.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated March 24, 1944.

JOHN W. CRANDALL,
Counsel for Petitioners.

GEO. WHITEFIELD BETTS, JR.,
HELEN F. TUOHY,
Of Counsel.

(12)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 823

AMERICAN-WEST AFRICAN LINE, INC. and
BARBER STEAMSHIP LINES, INC.,
Petitioners
(Claimant and Respondents-Appellants below),

against

"HUILEVER" S. A. DIVISION HUILERIES
DU CONGO BELGE, and others,
Respondents
(Libelants-Appellees below).

(Consolidated Causes)

BRIEF OF LIBELANTS-RESPONDENTS J. H. ROSSBACH & BROS. IMPORT CORPORATION AND G. LEVOR & CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. M. RICHARDSON LYETH,
MARK W. MACLAY,
Counsel for Respondents,
J. H. Rossbach & Bros. Import Corporation and G. Levor & Co., Inc.

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SUPREME COURT OF THE UNITED STATES

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC., Petitioners (Claimant and Respondents-Appellants below), against "HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others, Respondents (Libelants-Appellees below). (Consolidated Causes)	October Term 1943 No. 823

BRIEF OF LIBELANTS-RESPONDENTS J. H. ROSSBACH & BROS. IMPORT CORPORATION AND G. LEVOR & CO., INC.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

The opinion of the District Court (R. 1189-1203) is reported at 49 F. Supp. 945.

The opinion of the Circuit Court of Appeals (R. 1269-1273) is reported at 139 F. 2d 748.

Both courts below held the petitioners and the *Otho* liable for damage to cargo caused by a fracture of the shell plating in the No. 1 hold of the steamer.

Five libels in admiralty were brought in rem against the vessel and in personam against her owner and operator, two of them by the owners of cargo stowed exclusively in No. 1 hold into which seawater was admitted by the fractured plate and three by the owners of cargo stowed partly elsewhere.

This brief is filed on behalf of J. H. Rossbach & Bros. Import Corporation and G. Levor & Co., Inc., the owners of cargo stowed in No. 1 hold.

The five suits were tried together before Honorable George Murray Hulbert, D. J. in the United States District Court for the Southern District of New York, who held the ship and the petitioners liable in an opinion handed down on January 26, 1943 (R. 1189-1203). Five interlocutory decrees were entered in favor of the respective libelants (R. 1224-1234), and thereafter, on May 14, 1943, an order of consolidation was entered for the purpose of appeal to the Circuit Court of Appeals for the Second Circuit without prejudice to the entry of separate decrees on mandate in the District Court upon the disposition of the appeal (R. 1235-1236). Following the disposition of the appeal the consolidation of these causes was extended by order entered March 7, 1944 to include any proceedings in the Supreme Court of the United States for a review of the decree of the Circuit Court of Appeals (R. 1277).

The petitioners' appeal, allowed under date of May 19, 1943 (R. 1237-1238), from the interlocutory decrees to the Circuit Court of Appeals for the Second Circuit was argued November 8, 1943, before Swan, A. N. Hand and Chase, C. JJ. On January 5, 1944, the Circuit Court of

Appeals handed down an opinion by Swan, C. J., affirming the decrees below (R. 1269-1273).

The Circuit Court of Appeals made and filed on March 14, 1944, a single order of affirmance (R. 1276), in accordance with its opinion, which is the order of which the petitioners now seek review.

The opinion of the Circuit Court of Appeals states that the main issue presented by the appeal was the correctness of the District Court's findings of fact that:

1. The H-3 starboard plate was cracked and leaked seawater into No. 1 hold before the *Otho* encountered the severe storm of January 11, 1941.

2. The *Otho* was unseaworthy with respect to this plate when she sailed on her voyage.

3. Her owners had failed to exercise due diligence to make her seaworthy.

4. The crack in the hull plating resulted from such lack of diligence rather than from the perils of the sea (R. 1270).

5. The vessel's unseaworthiness in respect of the fractured shell plating resulting from want of due diligence caused the damage to the cargo stowed elsewhere than in No. 1 hold as well as that stowed in No. 1 hold (R. 1273).

The court below stated and reviewed in considerable detail the evidence on which the findings are based and held that they were sufficiently supported by the evidence and that "the findings of fact which the appellants challenge are not so clearly erroneous that an appellate court would be justified in setting them aside" (R. 1272).

Questions Presented

It is believed that, although the petition states 15 questions presented, pages 8-10, specifies 16 errors to be urged, pages 11-12, and gives 12 reasons for granting the writ, pages 13-15, the writ is sought upon the theory that the following questions are presented:

1. Whether the treatment by the Circuit Court of Appeals of findings of fact presents a question on which there is a conflict among the circuits.

2. Whether both lower courts were in error in finding that the crack in the shell plating developed before the storm was encountered, in failing to hold that the defect in the plate was a latent one not discoverable by due diligence, and in holding that the evidence established a causal relation between the unseaworthy plate and the damage to the cargo stowed elsewhere than in No. 1 hold.

3. Whether the Carriage of Goods by Sea Act in effect overrules the decision of this Court in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333 (1933), in requiring a causal relation between unseaworthiness and cargo damage as a condition of imposing liability for such damage on the carrier.

4. Whether the Carriage of Goods by Sea Act has changed the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296 (1934), that the burden of segregating cargo damage by unseaworthiness from that caused by an excepted peril is upon the carrier.

Argument

The petition for writ of certiorari should be denied for the underlying reasons that (a) it complains not of standards of seaworthiness or of due diligence adopted by the court below but of the application of those standards to the facts proved, and (b) it raises only questions of fact on which both courts below concurred.

The petition itself states a sufficient reason for its denial. On page 5 it is alleged that *The Zarembo*, 44 F. Supp. 915 (E. D. N. Y. 1942), 136 F. 2d 320 (C. C. A. 2nd, 1943), presented "exactly the same issues" as are presented here. This Court denied certiorari in that case. *Balfour, Guthrie & Co., Ltd.* v. *The Zarembo*, 320 U. S. 804 (1944). If "exactly the same issues" were presented there as are presented here, certiorari should be here denied.

With respect to the damage to the cargo stowed in No. 1 hold the contentions of the petition on their face relate purely to findings of fact and involve no issue of law. Hence, the petition does not present issues appropriate for review by this Court irrespective of what view may be taken of the correctness of the decisions of these questions of fact by the courts below.

In so far as the court below affirmed findings of fact because "not so clearly erroneous that an appellate court would be justified in setting them aside", it followed and employed the language of the Federal Rules of Civil Procedure, 28 U. S. C. foll. §723 (c), Rule 52 (a) of which provides that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the

opportunity of the trial court to judge of the credibility of the witnesses". In so doing the court below was following, not extending, the rule concerning findings of fact; and its decision does not raise the question as claimed in the petition as to whether the trial court's findings must be supported "merely by evidence or whether they must be supported by the clear weight of the evidence".

The general principle now established in the language of Rule 52 (a) has been stated in countless decisions in varying language and such variation in language appears to be the basis for the allegation of the petition that the decisions of the Circuit Courts of Appeal for the First and Eighth Circuits, in *Fleming* v. *Palmer*, 123 F. 2d 749 (C. C. A. 1st, 1941), and *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. 2d 412 (C. C. A. 8th, 1940), are in conflict. An examination of these decisions shows that they are merely candidates for addition to the list of cases in the appendix to the opinion in *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 126 F. 2d 992 (C. C. A. 2nd, 1942), and that they do not raise any question of conflict among the circuits.

While the two questions relating to the effect of the Carriage of Goods by Sea Act, 49 Stat. 1207-1213, 46 U. S. C. §§1300-1315, have no application to the cargo owned by the respondents on whose behalf this brief is filed, they nevertheless affect these two respondents because the Circuit Court of Appeals entered one order of affirmance and the petition seeks to bring up the whole record.

The decision of the court below does not involve the effect of the Carriage of Goods by Sea Act, 49 Stat. 1207-1213, 46 U. S. C. §§1300-1315, upon the decision of this Court in *May* v. *Hamburg Etc. Gesellschaft*, 290 U. S. 333 (1933), because both courts below specifically found that the damage to the cargo stowed elsewhere than in No. 1 hold was caused by the unseaworthiness of the *Otho* resulting from want of due diligence (R. 1273; Findings of Fact Nos. 56, 71, 72, Conclusion of Law No. 8, R. 1217, 1220-1223). As both courts found causal relation, the present case manifestly does not raise the question of liability in the absence of such causal relation.

The contentions of the petition with respect to burden of proof are without substance for at least two reasons. First, under the findings of fact the ship's unseaworthiness caused the damage to the cargo and the petitioners have thus far failed to bring any of the damage within an expected cause. Secondly, numerous cases decided since the passage of the Carriage of Goods by Sea Act in 1936 have been decided in accordance with the rule of *Schnell* v. *The Vallescura*, 293 U. S. 296 (1934), without questioning the current authority of that decision or suggesting that its applicability has been affected by the statute. *Pioneer Import Corporation* v. *The Lafcomo*, 138 F. 2d 907 (C. C. A. 2nd, 1943), certiorari denied January 31, 1944; *Wessels* v. *The Asturias*, 126 F. 2d 999, 1001 (C. C. A. 2nd, 1942).

The petition presents no question of public importance or any other question requiring this Court to re-examine the evidence which has been thoroughly considered and

discussed in the opinions of the Circuit Court of Appeals and the District Court; and it should, therefore, be denied.

New York, April 14, 1944.

Respectfully submitted,

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Counsel for Respondents,
J. H. Rossbach & Bros. Import Corporation and G. Levor & Co., Inc.

(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

No. 823.

AMERICAN-WEST AFRICAN LINE, INC. and BARBER STEAMSHIP LINES, INC.,
Petitioners,
(Claimant and Respondents-Appellants Below)

against

"HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, and others,
Respondents.
(Libellants-Appellees Below)

(CONSOLIDATED CAUSES)

BRIEF OF RESPONDENTS, "HUILEVER" S. A. DIVISION HUILERIES DU CONGO BELGE, *ET AL.*, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Statement.

Petitioners seek review of the findings and decree in admiralty of the Circuit Court of Appeals for the Second Circuit as set forth in the opinion of Judge Swan and concurred in by Judges Augustus N. Hand and Chase on January 5th, 1944, 139 Fed. (2d) 748 (R., pp. 1269-1273),

affirming the opinion and findings of Judge Murray Hulbert, United States District Court for the Southern District of New York, 49 Fed. Supp. 945 (R., pp. 1189-1203, 1204-1224). The decisions of both Courts below almost exclusively dealt with factual issues and were in complete accord.

Facts.

Some of the pertinent facts not emphasized in petitioners' statement are as follows:

The severely heavy weather encountered by the *Otho* did not commence until midnight of January 11th, 1941; but the No. 1 hold began making water eleven days earlier on December 30th, 1940, and notwithstanding daily special pumping of the bilges, water continued to enter the compartment throughout the quite moderate weather encountered during the interim. That the water was coming from the fractured H 3 plate is plainly indicated by the Chief Engineer (f. 1209) and the ship's hull expert Haight (ff. 2247-2250).

The foredeck of the *Otho* was awash during the day of January 11th, 1941 (f. 1517; Log Book Ex. W), and the pumps were working continuously on No. 1 hold throughout that day,—and thereafter until arrival at New York.

Accordingly, the fracture had first occurred during the calm weather of the early days of the voyage, and thereafter lengthened with the normal working of the ship until by the morning of January 11th, 1941, sufficient weight of water was in the hold to keep the decks awash and cause the vessel to lose her buoyancy, become sluggish and less manageable (ff. 1475-1478). While the District Court on the ship's own contradictory evidence found the *Otho* was first definitely *observed* to be "down by the head" on January 13th, 1941, the testimony she was "sluggish" as of earlier

dates stands accepted by the Circuit Court of Appeals (Opinion, R., p. 1273).

The breaking adrift of the ship's launch and other damage mentioned by petitioners was on January 12th, 1941; —a full day after the water in the No. 1 hold had weighted her down until the fore decks were completely awash.

Discussion of the weather *after* the ship's difficulties had commenced and thoroughly progressed as a result of the weight of water in the No. 1 hold is accordingly superfluous.

The facts with respect to the lack of inspection of the *Otho's* No. 1 hold plating will be outlined *infra*.

Decisions and Findings Below.

The District Court held that the plate fracture occurred *prior* to the storm; and that the petitioners were liable for the cargo damage on the ground it was caused by the ship's unseaworthiness resulting from a lack of due diligence. Clarifying the opinion Judge Hulbert's Findings of Fact Nos. 56, 71 and 72 (ff. 3650, 3659-3660), and Conclusion of Law No. 8 (f. 3666) ruled that *all* of the damage described in the libels, whether in No. 1 hold or elsewhere, "was *caused* by the unseaworthiness of the *S. S. Otho* resulting from respondents' (petitioners') failure to exercise due diligence to ascertain the unseaworthy condition of the vessel existing at the commencement of the voyage".

The opinion of the Circuit Court of Appeals unreservedly affirms the District Court; evidences thorough and careful study of the Record and states grounds for its affirmance that are additional to those mentioned by the Trial Court. Petition for re-hearing was denied.

Following the well settled doctrine of this Court, the concurrent decisions of the two Courts below upon questions of

fact should not be disturbed unless clearly erroneous (*The Carib Prince,* 170 U. S. 655, 658, and cases there cited).

Summary of Argument and Reasons for Denying the Writ.

The petition and brief constitute almost wholly a reargument of the facts, and do not develop the character of reasons usually considered by this Court as grounds for granting certiorari.

Reply to Petitioners' First Point.

While petitioners' First Point devotes ten pages to factual argument it is only the last five paragraphs (pp. 26-27) that mention one of the customary grounds for consideration of an application for a writ of certiorari, i.e. an alleged conflict of decisions between Circuits.

It is asserted the Fifth and Eighth Circuits are in conflict with the Second and Third Circuits "as to the effect to be given to a trial court's findings on appeal" (Brief, p. 26). Review of the cases cited indicates Petitioner's very minor distinction is wholly without a difference. The Eighth Circuit case, *State Farm Mut. Automobile Ins. Co.* v. *Bonacci, et al.,* 111 Fed. (2d) 412, 415, states that the rule covering the effect to be given a trial court's findings of fact "plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings", and "if the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses". The Court adds that the findings of fact are "presumptively correct" although not conclusive "if against the clear weight of the evidence". The authority

for the Eighth Circuit's explanation of the rule is quoted from this Court's decision in *Kellar* v. *Potomac Electric Co.*, 261 U. S. 428, as follows:

> "In that procedure, an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses."

In the instant case the opinion of the Court below manifests thorough review of the testimony and a decision that the *weight of the evidence* clearly substantiated the findings of the Trial Court. On the question of diligence it characterized the inspections of Petitioner's maintenance officials as being "plainly" such as would not discover the defect in the plate which later fractured, and says the inspection of the American Bureau surveyors was even less adequate in that no inspection at all was made of the interior side of the plating in No. 1 hold,—where the corrosion grooves were later found. The Circuit Court's opinion stated *added grounds* for disbelief of the testimony of Capt. Paul and Chief Officer Printzlau concerning their alleged examination of the ship's interior plating.

With such analysis of the testimony Petitioner was thus left without *any* competent inspection of the dilapidated areas of the plating. There can be no other conclusion but that the Court below considered, and meant by its opinion, that Judge Hulbert's findings were in fact supported by the *weight of the evidence* rather than by merely a few odd bits of testimony here and there as seems to be petitioners' contention.

It appears to these respondents that the Circuit Court in the case at bar is not in conflict with the Eighth and First Circuits, but on the contrary has applied the rule and given effect to the requirements thereof in exactly the same fashion as discussed by the two latter circuits. It is clear the Court below was of the view that the findings of the District Court were not *against* the weight of the evidence as was the decision of the Appellate Court in *Fleming* v. *Palmer*, cited by petitioners.

While not within the character of reasons generally considered by this Court upon petition for writ of certiorari, the petitioners appear aggrieved by reason of an adverse decree in the instant case as against a favorable one in *The Zarembo*, 44 Fed. Supp. 915 (E. D. N. Y.); 136 Fed. (2d) 320 (C. C. A. 2). It is claimed, although not conceded by these respondents, that the two cases are practically on all fours. In opposing the appeal in the *Zarembo* case petitioners relied upon the same rule in urging upon the Circuit Court of Appeals that the District Court's findings of fact there should not be disturbed on the ground they were not clearly erroneous.

While it is true the *Zarembo* casualty resulted from a fractured plate in No. 1 hold, the District Court attributed such fracture to extremely heavy weather encountered by the vessel amounting to a peril of the sea within the exceptions of the bills of lading and Carriage of Goods By Sea Act, and finding further that due diligence had been used, the libel was dismissed. In the case of the *Otho*, however, the defective plate fractured in calm weather ten days prior to the heavy weather commencing in the late evening of January 11th, 1941. Accordingly, the issue of sea peril is eliminated in the instant case.

Petitioners endeavor to make a favorable comparison between the diligence exercised with respect to the *Zarembo*

as against the lack of inspection of the *Otho*. In making such comparison Petitioners again rely on the discredited testimony of Capt. Paul and Chief Officer Printzlau which has already been discussed. Aside from such discredited testimony, and that of the master, there was no examination, inspection or testing, with hammer, scraping or otherwise, of the inside shell plating of the *Otho*. If there was a diligent inspection of the *Zarembo* certainly the same may not be said of the *Otho*, and any comparison is therefore worthless.

Moreover, it is not admitted or established that the condition of the *Zarembo* plate prior to the voyage was in fact of the same appearance as the *Otho* plate, and while there may be some similarity between the type of fracture in the two cases, they are far from being on all fours on the questions of diligence, sea perils or the time element.

Petitioners (Brief, p. 21) touch but lightly upon a cautioning circular issued to the American Bureau surveyors on May 20th, 1937, which is quoted in Judge Hulbert's opinion (ff. 3599-3602). There is a failure to mention, however, that as a result of the fracture of the *Zarembo* plate such circular was immediately (April 1941) re-issued,—again cautioning the surveyors to exercise still greater care in searching for the corroded condition existing along the longitudinal frames of Isherwood designed ships. The *Otho* sailed within nine months after the *Zarembo's* difficulties and within six months of the re-issue of the cautioning circular, yet it is admitted that neither the *Zarembo's* trouble nor the circular were in any way instrumental in occasioning any greater degree of diligence than had theretofore been used. On the contrary, it is clearly evident by the decisions of the Courts in both causes that the inspections of the *Otho's* No. 1 hold plating were far less diligent than those enumerated by the District Court in the *Zarembo* case.

Discovery of the corroded gutters or grooves eating three-quarters of the way through the ship's shell plating, is not, as asserted by petitioners (Brief, p. 21) a baffling problem. The diagram, attached to the American Bureau's circular (Hill Ex. 5, R., p. 1149) graphically illustrates the condition and the ease of discovery thereof. As mentioned by the District Court, surveyor Narter, upon completion of the voyage, located numerous other similarly corroded plate areas merely "by searching out with my flashlight used as a guide and then using my hammer and digging around along the heels of the longitudinal frames". Narter testified that his inspection after the voyage would have discovered the defective conditions without respect to whether or not water had been in the hold for the few days prior to arrival at New York (f. 1152).

As to petitioners' discussion of Tour's testimony (Brief, p. 25) the Circuit Court of Appeals finds the witness' testimony exactly contrary to petitioners' interpretation (R., p. 1271).

Respondents submit that petitioners' First Point fails to present any grounds or reasons which this Court customarily considers when reviewing an application for a writ of certiorari.

Reply to Petitioners' Second and Third Points.

These points involve seawater damage to cargo in the No. 2 'tween decks, lower hold, bridge deck space, and the palm oil remaining in the deep tanks after jettisoning of 870 tons thereof on January 13th, 1941, and sweat damage in the No. 2 compartments. Compared to No. 1 hold the total of these damages involve comparatively little and particularly the sweat damage amounts to a few hundred dollars only.

Petitioners question the findings of the Courts below that the damage was caused by unseaworthiness resulting from want of due diligence rather than by a peril of the sea and maintains it was respondent's burden to show a causal relation between the unseaworthiness of the *Otho* and the cargo damage exclusive of No. 1 hold. Upon the inaccurate factual assumption that the Courts below found no such causal relation petitioners thereupon discuss some inapplicable decisions.

The inaccuracy of the argument is demonstrated by the fact that the District Court did rule, and was affirmed by the Circuit Court of Appeals, that *all* of the damage described in the libels "was *caused* by the unseaworthiness of the *S. S. Otho* resulting from respondent's failure to exercise due diligence to ascertain the unseaworthy condition of the vessel existing at the time of commencement of her voyage" (R., p. 1222 f. 3666), and the Findings of Facts Nos. 56, 71 and 72 (ff. 3650, 3659-3660) reiterated the holding. Proximate cause and causal relation is therefore established and no argument on the point of law is required.

Petitioners blandly state (Brief, p. 28) that the *Otho* "was observed to be acting sluggishly" on January 13th, 1941, and states further in the same paragraph that if she had "gone by the head" earlier her officers, of course, would have noticed it. Neither the record nor the decisions of the Courts below support such assertion.

Had the *Otho* on January 11th, 1941, not been heavily weighted with water in the No. 1 hold and therefore sluggish and non-buoyant, there is not the slightest indication in the case that the ventilators, motor launch or other equipment would have been broken adrift by the seas, nor that the bridge deck doors would have been sprung to some extent on the following day. Such was the view of

Judge Hulbert and the Circuit Court of Appeals (C. C. A. Opinion, R., p. 1273).

Accordingly, the seawater damage in the bridge deck, deep tanks and the No. 2 cargo compartments traces directly back to the fractured plate, and establishes the unseaworthiness as the proximate cause of all of the damage, and its causal relation to the unseaworthy condition.

Concerning the seawater damage to the peppers stowed in the bridge deck space of the *Otho*, Petitioners say no more than that the doors leading to that compartment were sprung by the heavy seas. There is not, however, even the slightest evidence with respect to the condition of the bridge deck doors prior to the voyage nor whether the rubber gaskets customarily used were in a proper condition to make the doors watertight, nor is there any evidence in the case explaining why water seeping through the sprung (if that be the fact) doors did not find its way to the scuppers, if any (ff. 1294-1296), another failure of proof. If the cargo in the bridge deck was properly dunnaged, water entering in such small quantities should have drained to the scuppers, assuming any were there and functioning properly. Petitioners may not leave open and unproved the proper condition of the ship to receive and carry her cargo, and as the shipowner has the burden of establishing both the primary and secondary causes of damage and due diligence with respect to such causes, the complete failure of any proof thereon entitled libellants to a decree.

As to the sweat damage in No. 2 'tween decks or holds, the seawater entering the cargo space created excessive atmospheric moisture necessarily resulting in condensation of sweat. So it was held by the Second Circuit in *The Asturias*, 126 Fed. (2d) 999, in affirmance of Judge Hulbert's District Court opinion, 40 Fed. Supp. 168. Moreover, there

were only three ventilators leading to the No. 2 compartment but assuming that was enough there is no evidence ventilation of the cargo space was augmented by the opening of the hatches during any part of the voyage when, in fact, calm weather was being encountered; in fact there is square admission to the contrary (ff. 1852-1854). So it must be assumed there was sweat in the space even before the seawater entered. It has been so frequently held that the use of such means is required to augment normal circulation of air through the ventilators that citation of extensive authorities is hardly needed (*The Vallescura*, 293 U. S. 296).

Notwithstanding the No. 2 hatch tarpaulins were torn and the bridge deck doors sprung on January 12th, the Courts indicated, and it seems indisputably established, that such damage was either wholly, or to a major extent, caused by the fact the entire fore deck of the *Otho* was completely and almost continuously under water from the morning of January 11th until arrival in New York on January 17th. Any heavy weather after January 11th, therefore, merely increased the ship's difficulties originating with the fractured plate.

It is accordingly not necessary further to discuss the "causal connection" doctrine of *The Isis* and the unauthoritative brochures referred to in petitioners' brief.

Basic error in petitioners' argument lies in the mistaken interpretation of the District Court's opinion to the effect that "presumably a sea peril was the first cause of this damage and that subsequently the damage was aggravated when the ship went by the head" (Brief, p. 30), and petitioners' suggestion that "it was the sea peril which first paved the way for the water to enter the No. 2 hatch, the bridge deck and the deep tanks" (Brief, p. 34). Neither of the lower Courts speak of *aggravation* of the damage as a

result of the ship going by the head. The decisions attribute the damage *initially* to the sluggishness caused by the weight of water in the No. 1 hold resulting from the fractured plate.

The District Court has not distinguished between the salt water damage in No. 2 hold and the sweat damage therein. Finding No. 71 ascribes the sweat damage to excessive atmospheric moisture created when seawater entered that space as a result of damage to the ventilators, and such damage to the ventilators was attributed to the unseaworthiness. If the sweat was thus attributable to the unseaworthiness so must have been the salt water which caused the sweat. In advancing such argument Petitioner sees fit to overlook entirely the District Court's conclusion that *all* of the damage described in the libels was caused by the ship's unseaworthiness.

Inasmuch as respondents showed and as the Courts below found that the *Otho* was sluggish, lacked buoyancy, and was unmanageable prior to January 12th, petitioners' argument with respect to the burden of proof (Brief, pp. 32, 33, 34) needs no reply.

By reason of the inapplicability of the legal points argued under the cases cited in petitioners' brief, there is no conflict between the decision below and those of this Court.

Reply to Petitioners' Fourth Point.

Having in mind the District Court's conclusion that *all* of the damage described in the libel was caused by the unseaworthiness of the *Otho* resulting from a want of due diligence, it would again appear petitioners' argument under Point Four is inapplicable. Petitioners state (Brief, p. 38) that "under the cases we have cited (pp. 32-33) they (respondents) must show that the unseaworthiness caused

their damage." The Court has so found and that would seem to end the matter.

Moreover respondents are at a loss to reason out any sound basis upon which the *Vallescura* doctrine should have any different application to a contractual exemption permitted by statute (Carriage of Goods by Sea Act) than it would under an exactly similar exemption contained in a bill of lading contract of a common carrier prior to the Act.

With respect to burden of proof, this Court, *subsequent to the passage of the Carriage of Goods by Sea Act*, has again pointed out the applicability of the *Vallescura* rule in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 109 (1941) by saying:

> "For this reason, the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, *whether imposed by statute or because he is a common carrier* or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrision, supra*, 211; *The Majestic*, 166 U. S. 375; *Schnell* v. *The Vallescura, supra; The Beeche Dene*, 55 F. 525. Cf. 39 Stat. 539, 49 U. S. C. §88; Uniform Bill of Lading Act, §12. See IX Wigmore on Evidence (3rd ed.) §2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina*, 212 U. S. 354, 363; *Schnell* v. *The Vallescura, supra*, 306, 307." (Emphasis ours.)

Likewise the doctrine of *The Vallescura* has just recently been applied by the Circuit Court of Appeals for the Second Circuit in *Pioneer Import Corporation* v. *The Lafcomo*, 138 Fed. (2) 907, 908; and certiorari was denied on January

31, 1944, to the same proctors as are appearing here for petitioners.

Reply to Petitioners' Fifth Point.

Petitioners (Brief, p. 39) suggest the District Court left unclarified the brief reference in the opinion to an apportionment of the damages. On that question the Court's opinion reads:

> "There is also proof that because of high seas during the storm, and damage to the ventilators, a condition of sweat was produced which, to some extent affected the cargo. But the facts have not been sufficiently developed to enable me to make specific findings as a basis of an apportionment of the damages and the several causes contributing thereto."

It is, of course, evident the District Court referred merely to the possibility of some of the sweat damage having been caused by the increased moisture in the No. 2 compartment as the result of seawater having entered due to the unmanageability of the vessel, as against the possibility of some sweat having resulted from a prior condition or the subsequent closing of the ventilator openings by reason of heavy weather on January 12th and 13th. Petitioners state "The confusion was deepened by the Court's findings and conclusions, which remained unclarified in spite of our efforts to have them clarified." On the contrary the Court's findings do clarify the opinion by stating clearly that the sweat damage was attributable to the ship's unseaworthiness (Finding No. 71, R., p. 1220, f. 3660), and by Conclusion No. 8 (R., p. 1222, f. 3666) that all of the damage described in the libel was not due to the perils of the sea but to unseaworthiness resulting from a lack of due diligence.

By his findings and conclusions the Judge appears to have recognized that neither he nor any other authority

could establish a criterion under which the sweat damage attributable to the increased moisture due to the seawater in the No. 2 hold and which resulted from unseaworthiness, could be segregated from possible damage which may have been due to the necessity of closing the ventilators for the short period of heavy weather. The Appellate Court implied that if it was possible to establish that some of the sweat damage was due to normal closing of the ventilators by reason of heavy weather, such opportunity would still be open for proof as to the extent thereof before the Referee on damages. But the impossibility seems to have been recognized and indicated by the last sentence of the opinion reading: "The opportunity to make such apportionment, *if possible*, will still be open to the appellants upon the Referee's order for petition of damages".

But if there could be a yardstick or criterion for segregating the possible two types of sweat damage, such criterion would involve questions of fact to be settled by the Referee on proper proof by petitioner. The question is hardly one within the category ordinarily considered by this Court on a Petition for Writ of Certiorari.

Conclusion.

The petition should be denied.

Dated April 7, 1944.

Respectfully submitted,

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